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Flying Diamond Oil Corporation, Formerly Known as Flying Diamond Corporation, a Utah Corporation v. Newton Sheep Company, a Limited Partnership; Ralph M. Newton, Eugene B. Newton And Scott F. Newton, General Partners; And Eugene B. Newton, Individually, And Edna Elliott Newton, His Wife : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

FLYING DIAMOND OIL CORPORATION, :
formerly known as FLYING DIAMOND :
CORPORATION, a Utah corporation, :
:

Plaintiff-Appellant, :
:

vs. :
:

NEWTON SHEEP COMPANY, a limited :
partnership; RALPH M. NEWTON, :
EUGENE B. NEWTON and SCOTT F. :
NEWTON, general partners; and :
EUGENE B. NEWTON, individually, :
and EDNA ELLIOTT NEWTON, his wife, :

Case No. 19178

Defendants-Respondents. :
:

and :
:

BASS ENTERPRISES PRODUCTION CO., :
a Texas corporation, :
:

Intervenor Defendant- :
Respondent. :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SUMMIT COUNTY, STATE OF UTAH,
HONORABLE ERNEST F. BALDWIN, JR., DISTRICT JUDGE.

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BRIEF OF APPELLANT

NATURE OF THE CASE

The owner of a severed oil and gas title covenanted to pay the surface owner amounts equal to 2 1/2% of the value of the oil and gas produced from the property, the covenant being made in consideration of the surface owner's grant of oil and gas operating easements; the case involves conflicting claims upon the benefit of the covenant.

DISPOSITION IN THE LOWER COURT

The lower court decreed that the defendant-respondent parties are entitled to specified fractions of the "moneys paid heretofore and hereafter" by reason of the covenant, and granted them money judgments against appellant for past payments made to appellant by the oil and gas owner.

RELIEF SOUGHT ON APPEAL

Appellant seeks vacation of the lower court's judgment, and a remand with directions for entry of a judgment declaring that appellant holds the entire benefit of the covenant and its proceeds.

STATEMENT OF FACTS

Preliminary Statement

This appeal is taken from the adjudication of one count of a five-count complaint. The complaint, filed by appellant Flying Diamond Oil Corporation ("Flying Diamond") seeks declaratory relief to construe a contract covering its purchase of a sheep ranch property from the respondent Newton parties ("the Newtons"). Respondent Bass Enterprises Production Company ("Bass") intervened as to Count I only. By agreement of the parties and upon the trial court's order, Count I was bifurcated and tried separately. The other counts remain pending in the court below.

In Count I Flying Diamond seeks a declaratory judgment that, notwithstanding the Newtons' contrary demands, Flying Diamond is entitled to all benefits of a covenant made by Champlin Petroleum Company ("Champlin") to make payments equal to 2 1/2% of the value of oil and gas production from certain sections of the ranch property. Flying Diamond, the owner of the surface, claims ownership of the covenant benefits as successor surface owner in accordance with the terms of the Surface Owner's Agreement in which the covenant was made. By counterclaim and cross-claim, the Newtons and Bass assert fractional interests in the covenant and the payments by virtue of royalty conveyances made before Flying Diamond acquired its surface ownership.

The appeal requires the construction of three conveyances. The factual title history is not disputed, and the summary in this brief refers to the Clerk's record with the notation "R_____." The summary of the trial evidence is supported by reference to the reporter's transcript, shown below as "Tr_____." (Throughout the transcript, the word "surface" appears as "service"; it is believed that formal corrections are not necessary as the intention of the speaker is clear enough from the context).

General Title Chronology

The conveyances requiring construction are the Surface Owner's Agreement (dated in 1971) which created the 2 1/2%

covenant interest, a mineral Deed (1972), and a Ranch Purchase Contract (1974). Each of these affects the mineral or surface title to the former Newton Sheep Ranch, a property of about 20,000 acres situated in Summit County.

About half of the Ranch consists of "railroad" sections. These, typically, are the odd-numbered sections which were patented to Union Pacific Railroad Company under the congressional land grants in aid of railroad construction. The history of those railroad sections involved in this case is that Union Pacific sold the surface to ranchers, retained the minerals thereunder, and later transferred the oil and gas title to Champlin, its oil and gas subsidiary (R 278). The even-numbered sections comprising the balance of the Ranch are the so-called "fee" sections (about 9,300 acres) and in these, typically, the rancher held both the surface and the mineral title.

For some years before the execution of the Surface Owner's Agreement, the surface title to the Ranch was held by Hyrum J. Newton & Sons Sheep Company (the "Newton Company"). The Newton Company also held the mineral title in the fee sections. The severed oil and gas title in the railroad sections was held by Champlin (R 278). The Surface Owner's Agreement, executed in September 1971 between the Newton Company and Champlin, covered six of the railroad sections (R 278-9; Exh. 1 at R 285).

Later in 1971 the Newton Company's interest in the Ranch was transferred to a family limited partnership, appellant Newton Sheep Company ("Newton Sheep") (R 279).

A transaction in February 1972 between Newton Sheep and Bass resulted in execution of a Deed conveying to Bass one half of the minerals in the fee lands, and one half of any royalty to which Newton Sheep was entitled in the railroad sections (R 279; Exh. 2 at R 293).

In 1974, Flying Diamond bought a major part of the Ranch from Newton Sheep under the Ranch Purchase Contract (R 279; Exh. 3 at R 298). As to the portion so acquired, the Contract granted to Flying Diamond the full surface title, one-half of any mineral rights still held in the fee lands, and one-half the royalty owned by Newton Sheep in the railroad sections.

After Flying Diamond's ranch acquisition, oil and gas discoveries were made by Champlin within certain of the railroad sections which are subject to all three coveyances: the Surface Owner's Agreement, the Newton-Bass Deed, and the Ranch Purchase Contract (R 279).

Flying Diamond acquired the Ranch surface in 1974, before any oil discovery, and since the beginning of production Champlin has remitted to Flying Diamond monthly cash payments equal to 2 1/2% of oil and gas sales proceeds (R 279), and continues to do so. (Pursuant to agreement among the parties, Flying Diamond is forwarding three-fourths of the monthly remittances, as they are received, to be held by an escrow agent until the case is resolved).

A summary of the conveyances follows:

Surface Owner's Agreement, dated September 24, 1971, between the Newton Company, as Land Owner, and Champlin (Exh. 1 at R 476-83). By this agreement, the Land Owner grants to Champlin easements to enter upon the surface, to drill, and to maintain specified surface "facilities" convenient to Champlin's oil and gas operations. In consideration, Champlin covenants (1) to make payments in cash equal to 2 1/2% of the value of oil and gas produced and marketed; (2) to pay rentals measured by the agricultural value of such surface as may be taken up in related unit operations; and (3) to pay for all damages to the surface and improvements. The agreement provides that no other payments shall be due the surface owner.

Section 7 provides that the three payment covenants are covenants "running with the surface ownership"; that they shall not be held, or transferred, separately from the surface ownership; and that the payments will be paid to the person or persons owning the surface at the time an individual payment becomes due, and to the subsequent surface owners, upon a title showing. Section 8 provides that the surface easements are appurtenant to the mineral title, and will bind the surface and all present and future surface owners. The agreement has an indefinite term, typical in oil and gas conveyancing: one year and so long thereafter as the oil and gas title is committed to a lease or a unit, or so long as production or operations continue. The agreement is assignable, subject, however, to

the Section 7 provisions stating that the payment covenants are inseparable from the surface ownership.

The inseparability provisions of Section 7 are quoted and analyzed in Point I(b) of the Argument below. A copy of the Surface Owner's Agreement is included in this brief as Appendix A.

Deed, dated February 1, 1972, made by Newton Sheep, as Grantor, to Bass, as Grantee (Exh. 2 at R 484-8). Subparagraph A.1. of the Deed grants a one-half interest in the oil, gas and other minerals in specifically described "fee lands" (9,316 acres); Subparagraph A.2., a catch-all clause, grants a like mineral interest in all of Grantor's fee lands within all affected townships. Subparagraph B.1., covering the railroad sections, conveys to Grantee ". . . one-half of the royalty (of any type) from production of minerals that the Grantor actually receives or is entitled to receive . . ." from the "Union Pacific Railroad Company Lands" (10,003 acres). Other provisions create for Bass a first right of purchase, a covenant of further assurances, and a warranty of title. Newton Sheep also makes two specific warranties concerning the so-called royalty interest which are discussed below.

A copy of the Deed is included as Appendix B.

The Newton Ranch Purchase Contract, dated April 12, 1974, made between Newton Sheep, as Seller, and Flying Diamond, as Buyer (Exh. 3 at R 489-520). By the Contract, Flying Diamond acquired a warranted "full" surface title, one-half of

the oil, gas and other minerals then owned by Seller in the fee lands, and one-half of the "royalty (of any type)" in the railroad lands to which Seller is entitled. Newton Sheep also makes the same two specific warranties concerning the royalty interest as were set out in the Bass Deed.

Proceedings

Before trial, Flying Diamond moved for partial summary judgment based on the theory that the Surface Owner's Agreement operates to vest all rights in the 2 1/2% easement payment covenant in Flying Diamond, as successor surface owner, as a matter of law. Bass also made a motion for summary judgment, its theory being that the Deed's grant to Bass of one-half of the "royalty (of any type)" in the railroad lands was a grant of one half of the 2 1/2% covenant interest. Both motions were denied.

At trial, over Flying Diamond's objection, Bass and the Newtons introduced evidence to support their contention that the "royalty (of any type)" language in the Deed was intended to operate as a grant to Bass, and a reservation to Newton Sheep, of one-half each of the 2 1/2% covenant. William Collister, a Denver attorney retained by Bass to prepare the Deed, testified by deposition that subparagraph I.B. was intended to cover the royalty from production from the Union Pacific lands (Deposition of Collister (R 527), p. 21, line 25 - p. 22, line 30), royalty meaning, in his use of the phrase, "the two and a half percent royalty in the surface owners

agreement." (Deposition, p. 22, lines 24-25); see Tr 89 (introduction of Collister deposition at trial).

Mr. Collister further testified that he felt the words of grant in the Deed were sufficient to convey property in Utah (Deposition, p. 34) and that: "And my deed paragraph A conveys minerals and paragraph B conveys royalty. And there is a distinction" (p. 49, lines 6-7). Asked whether those two basic kinds of interests (mineral and royalty) included all kinds, the witness said "No, there are other things in existence clearly. The contractual right to receive monies, you know." (p. 49, lines 22-24).

With respect to the subject of a claimed estoppel of Flying Diamond, Scott Newton and Ralph Newton, general partners of Newton Sheep, testified that in the discussions preceding the sale of the Ranch in 1974, they advised Flying Diamond of Newton Sheep's earlier sale of one-half of the 2 1/2% payable in the railroad sections (Tr 64, 80) and that, having sold one-half to Bass, they (Flying Diamond) "would take a quarter of what was left of the half, and we would keep a quarter." (Tr 65)

Without waiving its earlier objection to all extrinsic evidence, Flying Diamond introduced the deposition testimony of the Land Manager of Champlin (Robert Lagerstrom) (Tr 90, R 528) about the purpose of the Surface Owner's Agreement:

What we told the landowners was what we took to be the purpose. It was to obtain their cooperation, to keep their goodwill, to prevent any disputes which might arise from uses that someone might consider beyond the scope of our reservation, and to provide a reasonable compensation to the landowner for his cooperation. (Deposition of Lagerstrom, p. 21.)

As to Section 7, the witness stated the following:

To assure that the benefits provided under the agreement would continue to be paid to the owner of the surface, so that Champlin or Union Pacific as the owner of the minerals would continue to have a contact with that surface owner. (Deposition of Saterstrom, p. 24.)

The trial exhibits show that when Newton Sheep was formed in 1971 and received its deed to the Ranch, it so advised Champlin, and that Champlin accepted the copy of the deed as sufficient for purposes of the Surface Owner's Agreement (Exh. 10 at R 523). On December 21, 1971, Champlin clarified its earlier letter by advising Newton Sheep that (Plaintiff's Exh. 9 at R 521) (emphasis added):

In order to clarify any possible confusion regarding the statement quoted above from our letter of December 7th, please be advised that payment of 2 1/2% of the value of production, if production is ever obtained, will be made to Newton Sheep Company only as long as Newton Sheep Company is the current land owner.

As indicated in our letter of December 7th and as recited in Section 7 of the Surface Owner's Agreement, the covenants of the Surface Owner's Agreement run with the surface ownership of the described premises. Therefore, if lands under production which are covered by this subject agreement was ever conveyed by Newton Sheep Company, then of course, Champlin's obligation to pay the 2 1/2% of the value of each production would, upon sufficient notice to Champlin, transfer to the new surface owner.

Plaintiff's Exh. 20 (R 524) shows that, while Bass was negotiating the Deed transaction with Newton Sheep, Bass was advised by James Wallace (Bass's agent) that "as long as they [Newton Sheep] own the surface they will receive 2 1/2% in the form of royalty which figures 128 mineral acres per section." (Emphasis added).

The lower court ruled in favor of the Bass-Newton parties. Its findings are, essentially, that the conveyancing intent of all parties was to acquire or reserve fractions of the "2 1/2% payment" (that being the term used in the Findings to mean the Section 2 payment interest (R 427)) and the conclusions are that the conveyances had that legal effect (R 429). The court also concluded that Flying Diamond was estopped, and that the Bass-Newton parties were not (R 429). Flying Diamond, as directed, submitted an accounting showing the payments made to it by Champlin. The court then entered the Final Judgment, which decrees that the Newtons are entitled to one-fourth, Bass is entitled to one-half, and Flying Diamond is entitled to one-fourth ". . . of the moneys paid heretofore and hereafter by Champlin under Section 2 of the Agreement," and which grants recovery from Flying Diamond of the respective fractional portions of the monies paid (R 460-463). The judgment also contains the court's express determination of finality required for appeal by Utah R. Civ. P. 54.

ARGUMENT

Point I. The 2 1/2% easement payment covenant, and the payments thereunder, are inseparable from the surface ownership because the Surface Owner's Agreement so operates as a matter of law, as appears from:

- (a) the recitals and legal background;
- (b) the provisions of the Agreement; and
- (c) the applicable rules of law.

(a) Recitals and legal background.

The purpose of the Surface Owner's Agreement is best seen against the background of its formal preliminary recitals and the general law those recitals invoke. The recitals are: that the Newton Company owns the described property subject to a prior reservation of the minerals by Union Pacific Railroad Company; that Champlin has succeeded to the ownership of the oil and gas title; and that Champlin proposes entry upon the surface by it or its lessee for oil and gas purposes.

This recital of the earlier severance of the mineral title from the surface title invokes the general legal consequence that severance vests some right of surface use in the mineral owner, either express or implied. This Court has stated the general relationship of the respective rights to be as follows:

The general rule which is approved by all jurisdictions that have considered the matter is that the ownership (or rights of a lessee) of mineral rights in land is dominant over the rights of the owner of the fee to the extent reasonably necessary to extract the minerals therefrom. This dominance is limited in that the mineral owner may exercise that right only as reasonably necessary for that purpose and consistent with allowing the fee owner the greatest possible use of his property consistent therewith.

Flying Diamond v. Rust, 551 P.2d 509, 511 (Utah 1976)

(citations omitted).

Some potential for disagreement between the respective owners as to what is reasonably necessary is inherent in this situation, and this subject is treated in a recent, lengthy

annotation, Oil and Gas - Necessary Use of Surface, 53 A.L.R.3d 16, 16-174. The introduction states (53 A.L.R.3d at 24):

This annotation deals with some aspects of the "age-old battle between a surface owner and mineral owner as to their respective rights" in the surface of the premises embraced by the mineral lease. Of all questions that beset the lessee-lessor relationship, none surpasses that of surface user and the resulting surface damages; thus, there is a "voluminous reservoir of law concerning the use of the surface by a lessee under the terms of an oil and gas lease." [Citations omitted].

The annotator analyzes many cases deciding whether a particular surface use by the oil and gas operator is actionable, as being not reasonably necessary in the circumstances. Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976), cited above, illustrates the problem and is discussed in the annotation (p. 4, Pocket Supp. 1982).

A footnote to the annotation (53 A.L.R.3d at 25, n.10) quotes Brimmer, The Rancher's Subservient Surface Estate, 5 Land and Water L. Rev. 49, 50 (1970), about the practicalities of the surface-mineral conflict:

The same writer has humorously pointed out that "if the meadows were wet and now badly rutted, and his mineral interest is nil anyway, then quicker than can be muttered 'Application for Temporary Injunction,' the client will demand the balm of instant legal redress and damages as an alternative to his itchy shotgun trigger finger."

The persuasive power of surface occupiers' itchy trigger fingers may be seen in the fact that they have been able in many areas to obtain compensation for surface or "location" damages which they well may not have had legal right to recover, but which have been paid by oil and gas producers as a matter of policy. . . .

Before the Surface Owner's Agreement was entered into, the relationship of the respective surface rights of the owners of the mineral and surface estates in the Newton Sheep Ranch held the potential difficulties discussed in the annotation. The Agreement was written against that general legal background. The testimony of Champlin's veteran land manager about the general purpose of the Agreement, and the purpose of the inseparability provisions, quoted above, show that the practical business objective is to obviate problems of the kind detailed in the cited annotation, on a continuing basis.

The essence of the Agreement lies in the inseparability provisions, the exchanged promises of the Newton Company and Champlin that during the term of the Agreement the payment covenants will not be separated from the surface ownership. If the Newton Company's inseparability promises could be ignored unilaterally, the relation between the surface and mineral estates would revert to what it was before the Agreement was signed. The Agreement's purpose would be thwarted.

- (b) The provisions of Surface Owner's Agreement determine the inseparability of the payment covenants and the monies payable thereunder as a matter of law.

The Surface Owner's Agreement provides, as clearly as language can convey meaning, that the surface payment covenants, and the proceeds, can not be separated from the surface ownership.

Section 7 states the parties' agreement concerning ". . . the covenants to pay the sums provided in Sections 2, 3, and 5 hereof [i.e., all three payment covenants]" as follows:

Such covenants ". . . shall be covenants running with the surface ownership";

The covenants ". . . shall not be held . . . separately [from the surface ownership]";

The covenants ". . . shall not be . . . transferred separately [from the surface ownership]"; and

". . . any sums payable under this Agreement shall be paid to the person or persons owning the surface of the described premises as of the date the oil and gas or associated liquid hydrocarbon production is marketed;" a "subsequent purchaser of the described premises" is entitled to the payments upon showing a chain of title to "such ownership."

(Emphasis added).

Apart from this language, other specially drafted provisions reinforce the agreed inseparability. These are:

(1) The successors-and-assigns provision. Section 10 permits either party to assign the agreement; its benefits and burdens extend to successors and assigns. This standard provision, however, is here expressly agreed to be "[s]ubject to the provisions of Section 7."

Section 7 states the inseparability provisions. The surface ownership and the covenants thus are transferrable, but only simultaneously and only to the same successor owner. Section 10 also precludes the separated transfer the Bass-Newton parties say they attempted.

(2) Identical handling of all payment covenants.

Section 7 accords identical attributes to all the easement payment covenants (the 2 1/2% payment; the acreage rental; and the damage payments): in the same terms, all are agreed to be inseparable from the surface title.

The inherent content of the covenant to reimburse damages to the Ranch surface is such that that covenant could not be transferred to another ranch property without destroying its meaning, nor could it with any logic be transferred in gross. The covenant to pay acreage rents is, in the same way, inseparable from this Ranch surface; to attempt to move it to another property would deprive it of any content, nor could it well be transferred in gross. The fact that the 2 1/2% covenant is treated in the same terms as the other two covenants shows the original parties' recognition that that covenant is also by its nature inseparable from this Ranch surface so long as the Agreement endures.

(3) Reciprocal nature of exchanged covenants. The easement benefits granted by Sec. 1 are for Champlin's use in connection with its oil and gas estate, and they continue for the benefit of successor owners of the oil and gas estate (Sec. 8); the easement burdens encumber the surface in the hands of "present and future owners" of the surface (Sec. 8). Being appurtenances to this oil and gas title, Champlin could not unilaterally deed the easement title to the owner of another mineral section, nor could it use the easements in operations

upon other mineral sections of its own. The easement benefits and burdens are inseparable from the described property for the limited life of this oil and gas project, and it is inherent in this pattern that the compensating payments are likewise tied to the described property for the life of the project.

(4) Match of surface payments to surface burdens.

Each of the easement payment covenants is so written that the amount of each recurring payment is adjustable, according to the degree of burden compensated: the acreage rental adjustment takes account of the area occupied and its ranching value; the surface damage payments match the damage caused; the 2 1/2% payment automatically varies in direct proportion with the intensity of production and marketing. This self-adjustment also operates in respect to timing, so that the separate remittances are payable when the particular easement burden is felt. Finally, the right to the individual payments is vested by the Agreement in the person affected by the impacts of the easements, the surface owner at the time. This fundamentally fair matching of payment to burden underlies the economic sense of the Agreement and explains why it precludes the alienation of severed fractions of the easement payment covenant.

(c) Applicable rules of real property law and contract law.

The initial theory of Bass and the Newtons was that the royalty described in the Deed was the 2 1/2% easement

payment interest. The real property theory was later disclaimed in favor of the theory that the case involves only a contractual assignment of monies paid and to be paid by Champlin. The course of this shift of position is detailed in Point V.

Flying Diamond submits that the 2 1/2% easement payment covenant is, as the parties who created it called it, a "covenant running with the surface ownership," and that questions concerning its incidents are governed by real property law and not contract law. In the event, here, the rules of both bodies of law lead to the same result.

This brief analyzes the legal nature of the 2 1/2% easement payment covenant, and the transferability of the covenant and its proceeds, in terms of real property law and also the rules of assignment developed in the law of contracts.

(1) Real Property Principles.

The Surface Owner's Agreement provides (Section 7) that all of the payment covenants are "covenants running with the surface ownership."

A basic textbook, 5 R. Powell, The Law of Real Property, ¶ 673 [1], pp. 60-35 to 60-38 (1981) (footnotes omitted), states with respect to the running of covenants:

[1] Generally. Covenants are either personal, that is they are enforceable only by the original covenantee, or they "run with the land." The difference hinges upon whether the original covenanting parties' respective rights or duties can devolve upon their successors. The covenantee's rights are known as the "benefit" while the

covenantor's duties are known as the "burden." When certain requirements are met, the benefit or the burden runs with the land to the covenantee's or the covenantor's successors.

The concept of covenants running with the land evolved from two separate lines of cases. The first line of cases began with the decision of an English court in Spencer's Case, where the plaintiff unsuccessfully brought suit at law to recover damages for breach of covenant. This line of cases thus concerns the running of covenants at law, or so-called "real covenants." Another English decision, in 1848, Tulk v. Moxhay, enjoined the breach of a covenant in equity, beginning a line of cases dealing with the running of covenants in equity, referred to in this Treatise as "equitable restrictions."

Different requirements have developed for the running of real covenants and the running of equitable restrictions. The elements most often said to be required for covenants to run at law are that: (1) the covenant "touch and concern" the land; (2) the original covenanting parties intend the covenant to run; and (3) there be some form of privity of estate. A fourth requirement, that the covenant be in writing, is also sometimes mentioned. For covenants to run in equity, courts require that: (1) the covenant "touch and concern" the land; (2) the original covenanting parties intend the covenant to run; and (3) the successor to the burden have "notice" of the covenant.

Powell also shows that a running covenant is an interest in land, for Statute of Frauds purposes. (Id. ¶ 671, pp. 60-14 to 60-15).

The rule recognized in the general law of contracts is that if a covenant runs with land and is not merely personal, it is to be construed and enforced in accordance with rules of real property law. The principles of contract law do not necessarily apply. Restatement of Contracts, Second, § 316(2)(1981). Comment b. to § 316 of the Contracts Restatement explains:

The law relating to covenants in conveyances and leases of land grew up as a part of the law of real property and is left to the Restatement, Second, of Property.

All elements mentioned by Powell as being required for the running of the benefit of the 2 1/2% covenant, both at law and in equity ("touch and concern," intent, privity, notice) appear in the present case:

"Touch and concern." Powell states (Id. ¶ 673 [2][a], pp. 60-40 to 60-41) (footnotes omitted):

The rule that a covenant cannot run with the land at law or in equity if it is only indirectly related to the land was derived from dicta in Spencer's Case. Known as the "touch and concern" requirement, the rule retains force today, although it has been greatly relaxed. The touch and concern requirement is the only essential for the running of covenants which focuses on an objective analysis of the contents of the covenant itself rather than the intentions of and relationships between the parties.

The majority of courts and writers now accept the test for the "touching and concerning of covenants" proposed by Dean Harry Bigelow, an eminent authority on the subject of covenants. Dean Bigelow said that if the covenantor's legal interest in land is rendered less valuable by the covenant's performance, then the burden of the covenant satisfies the requirement that the covenant touch and concern land. If, on the other hand, the covenantee's legal interest in land is rendered more valuable by the covenant's performance, then the benefit of the covenant satisfies the requirement that the covenant touch and concern land. [Footnotes omitted].

The textbook cites as examples of running real covenants "payments for the use of an easement." Id. ¶ 675 [2][a], pp. 60-89 to 60-90. That is this case. Powell's analysis shows (Id. ¶ 675[2][a], pp. 60-89 to 60-92) that an affirmative covenant to pay meets the "touch and concern" test where the underlying purpose is benefit to covenantor's own

land. Here, the exchange of easement for covenanted payments clearly benefits (and burdens) each affected estate. Touch and concern inheres directly in each estate in the land, and is not merely collateral.

Intent element. The parties to the Surface Owner's Agreement expressly stated that the 2 1/2% payment covenant would run with the surface ownership and this, according to Powell (Id. ¶ 673[2][b], p. 60-51), "should normally be decisive" as to the intent element.

Privity. Various kinds of privity have been required in the cases for the running of a covenant benefit ("mutual" - simultaneous interests in same land; "horizontal" - connected with a conveyance; and "vertical" - succession to affected estate). These are discussed at length by Powell. Id. ¶ 673[2][c], pp. 60-57 to 60-68. It is clear for present purposes that the grant of the appurtenant surface easement in exchange for the covenanted payments, and Flying Diamond's succession in title to the covenantee's surface estate, create such privity as is sufficient to meet any and all of the tests.

Notice. The recordation of the Surface Owner's Agreement satisfies the notice requirement.

The consequence of the determination that the 2 1/2% covenant benefit runs with the surface ownership is that when the estate with which it runs is later conveyed (here, the surface grant to Flying Diamond) the benefit necessarily passes as a part of the estate conveyed.

Real covenants are sometimes encountered in oil and gas conveyancing. The surface covenants involved here are, in their nature, similar to the standard "free gas" covenant (lessee's promise that the surface owner shall have gas, if available, at his residence on the property, without cost). The free-gas covenant has consistently been held to be a covenant running with the surface ownership, the benefit of which accrues automatically to the successor surface owner. Justice v. Pennzoil Co., 598 F.2d 1339 (4th Cir.), cert. denied, 444 U.S. 967 (1979); Jackson v. Farmer, 225 Kan. 732, 594 P.2d 177 (1979); Patrick v. Allen, 350 S.W.2d 481 (Ky. 1961); Sinclair Oil & Gas Co. v. Huffman, 376 P.2d 599 (Okla. 1962) (by implication); Annot., 79 A.L.R. 496, 502 (1932).

By operation of accepted real property principles, the grant of the Ranch surface title by Newton Sheep to Flying Diamond carried with it (by operation of law, as well as by the express covenant terms) the benefits of these payment covenants and the right to enforce them; the grant also divested Newton Sheep of all such benefits and rights. The rule is stated in II American Law of Property, § 9.19 (1952):

While the original covenantor retains the benefited land, he alone may sue to enforce the covenant either upon the basis of privity of contract or upon privity of estate. But when he has transferred his entire estate in the benefited land, the benefit has run to the assignee, and the latter alone can enforce the privity of estate basis of liability since the original covenantor no longer has any ownership of the benefited estate. Likewise, the assignee is also the only one who can enforce the

privity of contract liability. This is on the theory that the contract right is impliedly assigned with the benefited land, so as to pass with the benefit to the assignee.

(2) Principles of Contract Law.

If the problem presented by this case is analyzed in terms of the rules of contract law, the result is the same as that stated above. An assignment of fractional interests in the 2 1/2% payment interest, or an assignment of the individual payments accruing from time to time, cannot be given any legal effect. The Restatement of Contracts, Second, § 317(2) (1981) (emphasis added), states:

(2) A contractual right can be assigned unless

(a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden of risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or

(b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or

(c) assignment is validly precluded by contract.

Both underlined exceptions to § 317(2) are applicable. No contractual right to the 2 1/2% payment can be assigned. Subsection (c) applies because an assignment in gross of fractions of the covenant, or the recurring money payments, is precluded by contract provisions which forbid separate transfer and separate holding, and which vest the right of payment in the person who owns the surface when the individual remittance falls due. Subsection (a) applies because a diversion of remittances to a stranger to the surface

title would materially "reduce the value" to Champlin of the Surface Owner's Agreement. The purpose of the Agreement would be thwarted, as discussed in Point I(a).

The Bass-Newton assignment theory fails for an additional reason, founded in the language the parties used in the Deed. Even if the Deed could be read as if it were an assignment of future remittances, and even if the supposed assignment were not otherwise precluded, the Deed language would transfer only those payments to which the Grantor is "entitled" when the payment is due. The underlying condition is Newton Sheep's "entitlement" to the remittance, and this terminated upon its sale of the Ranch surface by operation of the very instrument creating the remittance obligation. The subject of assignment of conditional rights is treated in Restatement of Contracts, Second, § 320 (1981). It is there said that a conditional right can be assigned before the condition occurs, and that "the assignee's right is subject to the same conditions as was the assignor's." Id. Comment c. Thus, A can validly assign his future wages at X Company, but if he later resigns his employment the assignee has no claim upon the wages of X Company's next employee. The principle further defeats respondents' alternative theory.

Point II. Practical construction of the Surface Owner's Agreement by the parties shows that the 2 1/2% easement payment covenant is inseparable from the surface ownership.

As shown above, the 2 1/2% easement payment covenant and the accruing payments are as a matter of law inseparable from the surface title. This point can be validated through examination of the parties' actions pursuant to the Surface Owner's Agreement.

Some years before production, Champlin accepted Newton Sheep's showing of its succession to the surface title and took some care to advise Newton Sheep that the payments under the 2 1/2% covenant are inseparable from the surface ownership. (Exh. 9 at R 521). Later, Champlin accepted Flying Diamond's proof of its surface ownership. Champlin began monthly payments to Flying Diamond, as surface owner, when oil and gas marketing commenced. Champlin continued these surface payments notwithstanding that it was apprised of this suit when pre-trial discovery involved its personnel, and continues to do so to the present time.

Flying Diamond, by acts, construed the Agreement identically. Before production was obtained, Flying Diamond advised Champlin of its acquisition of the surface ownership. Flying Diamond has routinely accepted the 2 1/2% payments as its own. Upon the Newton demand to participate, it brought this action to declare its right to the covenant benefits.

Newton Sheep itself earlier submitted proof of its acquisition of surface title to Champlin for purposes of the Surface Owner's Agreement. (Exhs. 9 at R 521, 10 at R 523).

Similarly, although Bass and the Newtons now assert that their actions effectively separated the covenant payment from the surface title, their conduct shows a most practical recognition of inseparability. The Deed, drafted by Bass, was prepared within a month or two after Newton Sheep had been fully advised by Champlin about the inseparability provisions of Section 7. The Deed warrants the one-half mineral title in the fee lands; in contrast, the purported royalty grant in the Railroad lands operates only to the extent that Newton Sheep is "entitled." The quit-claim nature of the second grant recognizes the severability problem, then further addresses it in the second paragraph of Subparagraph B., which provides:

In addition to the specific warranties of paragraph IV hereof, the Grantor, as a real covenant, specifically covenants that the interest conveyed in this subparagraph B. constitutes a mutual covenant running with the land described on Exhibit "B", and all successive future owners of the interest conveyed under the provisions of this subparagraph B., shall have the right to invoke and enforce its provisions as the original signers thereto.

The two covenants Newton Sheep here makes concerning the fractional royalty it has purportedly severed and conveyed to a grantee owning no other interest in the Railroad lands, are (a) that the royalty runs with the Railroad lands, and (b) that it does not run but is enforceable in gross by all fractional successor royalty owners. The covenants contradict each other. Newton Sheep's breach is built in. Bass can have its money back if it chooses.

Practical construction is ". . . entitled to great, if not controlling influence" in ascertaining contract meaning. 17 Am. Jur. 2d, Contracts, § 274 (1964). The actions of all the parties show recognition, in practice, that the benefit of the covenant payments is inherent in the surface title.

Point III. The trial court improperly admitted extrinsic evidence; evidence of the "intent" of the parties to the Deed is immaterial because the earlier Surface Owner's Agreement is without ambiguity and is dispositive.

Before trial, Flying Diamond submitted a motion for partial summary judgment based on the theory that the unambiguous provisions of the Surface Owner's Agreement determine the case. This motion was renewed at trial and an objection was made to the admission of any extrinsic evidence. These motions were denied and the objection was overruled. It is argued in this point that the rulings were erroneous.

The rule in Utah governing deed construction was stated in Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979) (footnotes omitted) (emphasis in original), as follows:

This Court has long recognized the cardinal rule of deed construction that the intention of the parties as drawn from the whole deed must govern.

In the absence of ambiguity, the construction of deeds is a question of law for the court, and the main object in construing a deed is to ascertain the intention of the parties, especially that of the grantor, from the language used. The description of the property in a deed is *prima facie* an expression of the intention of the grantor and the term "intention," as applied to the construction of a deed, is to be

distinguished from its usual connotation. When so applied, it is a term of art and signifies a meaning of the writing.

Deeds are to be construed like other written instruments, and where a deed is plain and unambiguous, parol evidence is not admissible to vary its terms. It is the court's duty to construe a deed as it is written, and in the final analysis, each instrument must be construed in the light of its own language and peculiar facts. It is also well known that the intention of the parties to a conveyance is open to interpretation only when the words used are ambiguous.

The same rule is expressed in Ash v. State, 572 P.2d 1374, 1379 (Utah 1977) (footnote omitted) ("The deed is clear and unambiguous. When the intention of the parties can be ascertained from the words used in the deed, there remains nothing to effectuate that intention.")

It is apparent from a reading of the Surface Owner's Agreement, and increasingly apparent on re-readings, that the instrument was prepared with as much care as can be brought to legal drafting work. The Agreement is without ambiguity. Its provisions operate as a matter of law and require a judgment in Flying Diamond's favor.

If the Agreement so operates, evidence proffered by Bass and the Newtons about the subjective intent behind their later Deed is not material. It could not matter that they may have intended an attempt at a transfer of an interest in the 2 1/2% payment covenant because they could not have done so.

Point IV. The 2 1/2% payment covenant is not a "royalty (of any type)," and therefore the Deed from Newton Sheep to Bass did not grant, or reserve, any interest therein.

Initially, the case presented by Bass and the Newtons was based on the theory that the 2 1/2% easement payment covenant is a royalty, and that the "royalty (of any type)" language of the Bass-Newton Deed granted one-half, and reserved one-half, of the interest. The case was briefed on the royalty theory. A memorandum filed by Bass argues:

A. The 2 1/2% payment by Champlin is a royalty and assignable: -- The 2 1/2% share in the production from oil and gas granted to the Newtons is a nonparticipating royalty carved out of the oil and gas estate by the owner (Champlin) in favor of a third party (the Newtons). This type of royalty is called "non-participating" because it does not include participation in bonuses or delay rentals and because it carries no right to lease or to produce the oil and gas [citations omitted].

A nonparticipating royalty may be created by grant, as here, or by reservation either before or after a mineral lease is issued. The royalty in this case is a present vested incorporeal interest in the oil and gas estate and in the production therefrom. (Memorandum . . . In Support of [Bass's] Motion for Summary Judgment; R 126-7).

At trial, the Bass-Newton parties sought to prove intent that the royalty grant conveyed the 2 1/2% payment: the Collister testimony was wholly directed to that point. The findings and conclusions submitted by the Bass-Newton parties to the lower court reflects the royalty theory. The basic findings recite such an intent and the conclusions are that the conveyances effected the transfer of "the 2 1/2% payment" interest (Findings 6, 9; Conclusions 2, 3, 4, 5, 7, 9).

A theoretical difficulty with all this lies in the premise that the "2 1/2% payment" is a "royalty": if as a

legal matter it is not a royalty (a term having a technical meaning) a substantial problem of law is raised as to whether the Deed conveyed it. This may well have prompted the post-trial disavowal of the royalty theory by the Bass-Newton parties.

"Royalty" is defined by Williams & Meyers (H. Williams and C. Meyers, Oil and Gas Terms, 656 (5th ed. 1981)) as follows:

(1) The landowner's share of production, free of expenses of production.

(2) A share of production, free of expenses of production, e.g., an Overriding Royalty (q.v.) of 1/8 of the 7/8 working interest.

The Hornbook (R. Hemingway, Oil and Gas, § 2.7(C), p. 52 (1971)) states:

In the vast majority of jurisdictions a grant or reservation of a "royalty" interest will be interpreted as creating a non-cost bearing interest that will share only in a fractional portion of gross production, and will not participate in bonus, delay rentals, or the power to lease.

In a few jurisdictions, notably Oklahoma, the term "royalty" is treated as being uncertain in meaning and circumstances surrounding the transaction will bear on the supposed intent of the parties. Generally speaking, a grant of a "royalty" interest at a time when no lease is in existence will be construed as denoting a fully participating mineral estate; however, if a lease is in effect intent will be construed as indicating an interest that will share only in gross production. It is submitted that a treatment of the term "royalty" as uncertain in meaning is unsound.

These standard definitions of "royalty" have it in common that the term connotes a property interest in the oil

and gas. As shown above, Bass itself so argued to the trial court. (R 126-7).

Bass's position that the 2 1/2% easement payment covenant is a "nonparticipating royalty" which was "carved out" of Champlin's oil and gas estate in favor of the Newtons and is "a present vested incorporeal interest in the oil and gas estate," is plainly incorrect. The 2 1/2% payment is not a royalty in any standard legal sense. Moreover, and more important here, Bass's assertion is flatly contradicted by Section 4 of the Surface Owner's Agreement: "Nothing herein contained shall be construed as . . . a grant to Land Owner of oil or gas rights or rights in other associated liquid hydrocarbons." (R 480; Exh. 1).

Since Newton Sheep, as successor in interest under the Surface Owner's Agreement, did not own a royalty in the railroad lands, its quitclaim of a royalty therein to Bass had no effect.

Point V. The Final Judgment is erroneous because it is based on a theory of the case (that the Deed is an "assignment" of money proceeds) for which there is no support in the evidence or the findings and conclusions, and which is contrary to the Bass-Newton evidence.

As detailed above, the Bass-Newton case was essentially briefed and tried on the theory that the royalty grant to Bass conveyed a fractional interest in the 2 1/2% easement payment covenant. The record reflects, however, that in the course of the matter the alternative theory developed that the Deed is an "assignment" of money proceeds. The

opening statement of Bass refers to the theory (Tr 54). After findings and conclusions were entered (based on the royalty theory), the Bass-Newton parties apparently abandoned their royalty theory in favor of the assignment theory.

The second position is stated in the Memorandum Of Bass . . . In Response To Plaintiff's Motions (R 419-20):

It appears that plaintiff [Flying Diamond] sees the case from an entirely different point of view than do the Newtons and Bass. One would assume from the plaintiff's argument that this case is concerned with an effort to sever a property interest from the surface title, or to sever and transfer fractional interests in real property, or to assign a covenant, or to alter the bargain between Champlin and the Newtons or to assign a contractual right. This case is none of these things. . . .

* * * *

The question before the court is whether interests in the proceeds of an obligation to pay money are assignable. Nothing has been offered by plaintiff to show that a money obligation cannot be dealt with in such a manner.

The consequence of abandonment of the royalty theory is that it leaves the Final Judgment without support. The language of the Deed itself does not support it. None of the trial evidence supports the assignment theory; indeed, to the extent that the Bass evidence touches the subject matter it contradicts the assignment theory.

The Deed is not, nor does it purport to be, an assignment of the monies paid and to be paid by Champlin. On its face it is a present conveyance by a grantor to a grantee of a fractional royalty interest in described lands, accompanied by such standard real estate elements as a further

assurances covenant, warranty provisions, and a preferential right of purchase of minerals and royalty reserved to the grantor (treating them identically).

Bass's trial effort was wholly taken up trying to prove that the Deed's intent was to convey a fractional royalty interest. No witness testified that the Deed was intended to be an assignment of monies.

Bass's conveyancer testified that he considered the 2 1/2% covenant to be a royalty and that the Deed he prepared was intended to convey that royalty (Deposition of Collister (R 527), pp. 22, 25, 48, 49), conceding the obvious that "probably" the royalty grant would operate only upon what the grantor was entitled to grant (p. 36, lines 4-9).

The testimony of Mr. Collister precludes the new theory that the Deed can be read as if it were a contractual assignment of money proceeds. The witness said he employed words of grant sufficient to convey property in Utah (Deposition, p. 34), and that ". . . my deed paragraph A conveys minerals, and paragraph B conveys royalty" (Deposition, p. 49, ll. 6-7 [emphasis added]). He took care to note the existence of the basic legal distinction between mineral and royalty (p. 49, l. 7) then went on to say that other kinds of interests also exist: "No, there are other things clearly. The contractual right to receive monies, you know." (p. 49, ll. 22-24 (emphasis added)).

The record made by the Bass-Newton parties by their sole witness thus is that their Deed was intended to convey

royalty if it could, and that "royalty" differs in kind from "minerals" and from the "contractual right to receive monies." This record is fatal to the late-adopted-assignment theory.

The Judgment, founded as it is on a legal afterthought, is erroneous because it is unsupported by any evidence or by the findings and conclusions, and because it is contrary to the evidence.

Point VI. Estoppel by deed, arising out of the Surface Owner's Agreement, precludes any claim by the Newtons or Bass to the 2 1/2% easement payment covenant or the monies accruing thereunder.

The Newtons (and their privy, Bass) are precluded from claims upon the benefit of the payment covenants by the bar of estoppel by deed.

The Surface Owner's Agreement consists essentially of the Newton Company's grant of the surface easements and, in consideration thereof, Champlin's payment covenants. The Newton Company agrees that the payment covenants run with, and are not to be held or transferred separately from, the surface ownership. The Newtons and Bass now claim, to the contrary, that they have transferred and now hold fractional benefits in the covenant interest separately from the surface ownership. Estoppel by deed precludes the second assertion. The principle is stated in 28 Am. Jur. 2d, Estoppel And Waiver, § 4 (1966) (footnotes omitted):

The principle is that when a man has entered into a solemn engagement by deed, he shall not be permitted to deny any matter which he has asserted therein, for a deed is a solemn act to any part of which the law gives effect as the deliberate admission of the maker;

to him it stands for truth, and in every situation in which he may be placed with respect to it, it is true as to him. . . .

Estoppel by deed is a very important aspect of the law of estoppel. By reason of the operation of this doctrine, particularly upon grantors of real property and upon the passage of after-acquired title of such grantors, the effect of the doctrine upon grantees, and the effect and extent of control of recitals in conveyances as an estoppel upon parties thereto and their privies, many important and practical questions affecting the title to real property are controlled to a large extent. . . .

Estoppel by deed is particularly appropriate where, as here, the document is recorded in the land records of the County:

A person who is examining the record title to realty should be able to rely on the doctrine of estoppel by deed, without the necessity of having to investigate the possibility of a personal obligation to pay a money debt which might offset the estoppel by deed.

Id. Moreover, this estoppel operates with special force because of the Newton Company's declaration in the Surface Owner's Agreement that all of the payment covenants, including the 2 1/2% payment, are "covenants running with the surface ownership" of the Ranch:

Estoppels which run with the land and work thereon are not mere conclusions; they pass estates and constitute titles, and are muniments of title, assuring it to the purchaser.

Id. § 8 (emphasis added) (footnote omitted).

The estoppel precludes any Bass and Newton assertions of fractional titles in the 2 1/2% covenant interest. Further, since equity will not permit a result to be worked indirectly if that result is directly prohibited, Bass and the Newtons are

also estopped from claiming an interest in individual money remittances falling due under the easement payment covenant.

Point VII. The lower court's Conclusion (No. 7) that "Flying Diamond is estopped to deny that it has only a one-fourth interest in the 2 1/2% payment" is erroneous, in that:

- (a) no evidence supports it; and
- (b) the documents provide otherwise.

Conclusion No. 7 reflects acceptance by the lower court of an estoppel contention advanced in Bass's Trial Memorandum (R 363-5). The conclusion is based on Finding No. 9 that it was Flying Diamond's "intent" to acquire "one-fourth" of the "2 1/2% payment." The theory of the claimed estoppel is that when Flying Diamond bought the Ranch surface it also bought one-half of the "royalty (of any type)" then held by Newton Sheep; and that by intentionally and knowingly purchasing a one-fourth interest in the royalty, Flying Diamond is estopped from claiming a greater interest therein. Bass cited Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956); Dillon Inv. Co. v. Kinikin, 172 Kan. 523, 241 P.2d 493 (1952); and 28 Am. Jur. 2d, Estoppel and Waiver, § 13 (1966). These authorities state the generalization that the grantee of a deed is estopped from accepting the benefits of a transaction while at the same time inconsistently rejecting the accompanying burdens.

Since the Bass-Newton parties abandoned any claim upon the 2 1/2% covenant based on a real property theory of the

case, an estoppel by deed concept becomes irrelevant. However, that may be, no estoppel of Flying Diamond exists here.

The generalization mentioned above has no operation in this case. While the grant to Flying Diamond in the Ranch Purchase Contract was a warranted "full" title to the surface, it was a mere quitclaim of half the minerals then owned by Seller in the fee lands and a quitclaim of half of any royalty Seller "is entitled to receive" in the railroad lands.

There is no inconsistency between the purchase in 1974 of a warranted surface title together with a quit-claim of half of the Seller's railroad "royalty," if any, and Flying Diamond's present position that the grant of the surface incorporated all the burdens and benefits of the surface covenants and that the "royalty" quitclaim was, like that to Bass, ineffective. Flying Diamond's position is simply that the Ranch Purchase Contract applies in accordance with all of its terms.

It is settled law that a quitclaim will not give rise to an estoppel. 28 Am. Jur. 2d, Estoppel and Waiver, § 9 (1966). "[A] grantee . . . may deny that any estate or interest passed to him by a conveyance." Id. § 13.

Further, Finding No. 9, on which the claimed estoppel rests, is unsupported. The trial record contains no extrinsic evidence whatever about Flying Diamond's subjective "intent." Only the document itself is in evidence, and the intent stated there is to acquire half the royalty, if any, that the Seller can grant. The failure of the Finding to reflect the

conditional (quitclaiming) nature of the parties' "intent" is critical. Finding No. 9 is necessarily incorrect. Conclusion No. 7 is therefore wrong because unsupported.

CONCLUSION

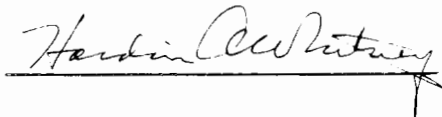
The judgment below should be vacated. The case should be remanded with a direction to the court below to enter judgment in Flying Diamond's favor declaring its ownership of the benefits of the 2 1/2% payment covenant, and its proceeds, free of any adverse claim of the Newtons or Bass, and to proceed with the disposition of the remaining issues of the litigation.

DATED this 7th day of October, 1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 1983, I served a copy of the attached Brief of Appellant by mailing a copy thereof in a securely sealed, postage paid envelope to the following:

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H. Dennis Priest

SURFACE OWNER'S AGREEMENT

THIS AGREEMENT, made and entered into this 24th
of September, 1971, by and between
J. PATRICK & SONS, INC., a Utah corporation, Salt Lake City, Utah

See
A

hereinafter for convenience called the "Land Owner"), and CHAMPLIN
PETROLEUM COMPANY (hereinafter for convenience called "Champlin");

W I T N E S S E T H:

RECITALS:

Land Owner is the owner of the following described premises
hereinafter referred to as "described premises":

All of Sections Seven (7), Nine (9), Fifteen (15), Seventeen (17), Nineteen (19),
and Twenty-one (21), Township Two (2) North, Range Seven (7) East of the Salt
Lake Base Meridian, Summit County, Utah.

Entry No.	114,102	Page	1133
RECORDED	10-1-71	9:32	336-543
REQUEST of Union Pacific Land Resources Co.			
FEE	\$11.50	VICTOR SPRINGS SERVICE CO. RECORDS	
SIGNED		By Victor Springs	
INDEXED		ATTACHED	

BOOK M33 PAGE 236

2001, however, to exceptions and reservations of minerals and rights of
kind of surface use contained in a certain deed or deeds of conveyance,
follows: Warranty Deed No. 1091 dated September 27, 1906, from Union Pacific
Road Company to William Salmon, recorded March 6, 1907, in Book 1 at Page 51;
Warranty Deed No. 2376 dated August 26, 1909, from Union Pacific Railroad Company
to S. Condie, F.S. Condie and Thomas S. Condie, recorded February 3, 1910, in
Book 1 at Page 21; Warranty Deed No. 2732 dated July 25, 1902, from Union
Pacific Railroad Company to David Jeff, 1/3 interest, Samuel Jeff, 1/3 interest,
Frank H. Jeff, 1/3 interest, recorded September 7, 1909, in Book 1 at Page 57;
Warranty Deed No. 3432 dated August 9, 1910, from Union Pacific Railroad Company
to George C. Hedden, George H. Hedden and John J. Hedden, recorded September 12, 1910,
in Book 1 at Page 22; Warranty Deed No. 3227 dated March 3, 1910, from Union
Pacific Railroad Company to George G. Hedden, George C. Hedden and John J. Hedden,
recorded June 16, 1910, in Book 1 at Page 135; all in the office of the County
Clerk and Recorder of Summit County, Utah.

~~It is hereby agreed that the entire and undivided interest of the parties in and to the oil, gas, and associated liquid hydrocarbons in and to the surface and subsurface contained in a certain deed or~~

Champlin is successor in interest to all the right, title, and interest of Union Pacific Railroad Company in and to the oil, gas, and associated liquid hydrocarbons in said premises for a term or period equal to or exceeding the term of this Surface Lease Agreement.

Champlin proposes for Champlin or its agents, lessees, licensees, successors, or assigns to prospect upon and explore the described premises for the development and production of oil, gas, and associated liquid hydrocarbon substances either on Champlin's behalf or under or pursuant to an oil and gas lease or license, or under or pursuant to a "unitization agreement," meaning here and wherever that term is used herein any operating agreement, or any other agreement covering the exploration or development for the production of oil, gas, or associated liquid hydrocarbons, or any pooling, communitization, unit or other agreement whereby the described premises may be included with other lands in proximity thereto as a unit area under a plan of unit or joint exploration, development, and operation.

AGREEMENT:

NOW, THEREFORE, it is agreed as follows:

Section 1. In consideration of the mutual benefits and of the sum of Ten Dollars (\$10) paid by Champlin to Land Owner, receipt whereof is hereby acknowledged, Land Owner hereby confirms, extends, and grants to Champlin, its agents, lessees, licensees, successors, and assigns, including any operator or unit operator from time to time in charge of operations under a unitization agreement, and their respective successors and assigns, the easements and rights to enter upon the described premises and to drill, construct, maintain and use upon, within, and over said premises all oil wells, gas wells, derricks, machinery, tanks, drips, boilers, engines, pipe, power and telephone lines, roadways, water wells, and, without limitation by reason of the foregoing enumeration, any and all other structures, equipment, fixtures, appurtenances, or

ilities (all the above being included under the term "facilities") necessary or convenient in prospecting and developing for, producing, mining, transporting, and marketing oil, gas, and associated liquid carbon substances under or produced from any portion of the described premises or under or produced from any portion of the unit created under a unitization agreement, together with the right to remove said facilities and the right to use such water as may be needed from the described premises, not including water from Land Owner's wells.

Section 2. Champlin agrees, so long as it is receiving oil and/or gas production from or oil and/or gas royalties upon production from the described premises or allocated thereto under the provisions of a unitization agreement, to pay or cause to be paid to the Land Owner in cash the value on the premises of two and one-half percent (2 1/2%) of all the oil and gas and associated liquid hydrocarbons hereafter produced, saved, and marketed therefrom or allocated thereto as aforesaid, except oil and gas and associated liquid hydrocarbons used in operations on the premises or used under the unitization agreement, and except that as to casinghead gasoline and other products manufactured from gas there shall be deducted the cost of manufacture; provided, however, that during any time the described premises or any portion thereof are included within the boundaries of a participating, pooled, or communitized area, (to which inclusion Land Owner expressly consents) and there is no provision for the payment of royalties to Champlin but it participates in the production from the pooled, communitized, or unit area as a working interest owner, then the two and one-half percent (2 1/2%) above set forth shall be applied to that percentage of the total production from such area which is allocated to the described premises.

When production of oil from lands under several surface ownerships is commingled in one central tank settling for practical operating reasons, periodic individual well tests may be made to compute the quantities of commingled oil properly allocable to each well, and the two and one-half percent (2 1/2%) payment provided herein shall be payable upon the quantities apportioned to each well as reported to Champlin in full satisfaction of the obligations of Champlin under this Section 2.

Section 3. Should the described premises or any portion of at any time be committed to a unitization agreement, the operator or unit operator under such agreement may exercise the rights granted under Section 1 hereof during the period ending with the fifth calendar year following the date of this agreement without compensation to the Land Owner other than payment as above provided, but after said period if such operator shall install or maintain any facilities other than pipe or pole lines upon the described premises during any calendar year, it shall pay Land Owner One Dollar (\$.1.00) per acre for the acreage used during any part of that calendar year, if such use substantially deprives the Land Owner of the use of such acreage. The above amount of One Dollar (\$.1.00) per acre shall be subject to upward revision upon a showing by the Land Owner that the land involved has heretofore earned and is capable of earning a greater sum per acre.

Section 4. Nothing herein contained shall be construed as a covenant to drill by Champlin, its agents, lessees, licensees, successors, or assigns, or by any operator or unit operator, or as a grant to Land Owner of oil or gas rights or rights in other associated liquid hydrocarbons.

Section 5. Champlin, its agents, lessees, licensees, successors, and assigns, including the operator or unit operator under a unitization agreement, shall be required: (a) to pay for all damage to Land Owner's lands, buildings, and growing crops caused by the erection or construction of facilities to be used in connection with oil or gas or associated liquid hydrocarbon operations; (b) to bury all pipe lines below plow depth where such lines cross cultivated land; and (c) to construct gates or at its option install cattle guards where necessary for crossing fenced land in connection with exploration, development, or producing operations and, where an election has been made to construct gates in lieu of cattle guards, to keep such gates in repair and closed.

Section 6. Other than the payments to be made as aforesaid, the Land Owner shall not be entitled to any other or additional payments as a result of the conduct of operations upon the described premises.

Section 7. Subject to the provisions of Section 9 hereof, it is agreed that the covenants to pay the sums provided in Sections 2, 3, and 5 hereof shall be covenants running with the surface ownership of the described premises and shall not be held or transferred separately therefrom, and any sums payable under this agreement shall be paid to the person or persons owning the surface of the described premises as of the date the oil or gas

associated liquid hydrocarbon production is marketed. Champlin will not, however, become obligated to make such payments to any subsequent purchaser of the described premises and shall continue to make such payments to the Land Owner until the first day of the month following the receipt by Champlin of notice of change of ownership, consisting of the original or certified copies of the instrument or instruments constituting a complete chain of title from the Land Owner to the party claiming such ownership, and then only as to payments thereafter made.

Section 8. The easements, rights, and uses herein shall be binding upon the described premises and each and every part thereof, and the present and future owners thereof, and shall continue for the benefit of the present or future owners of the oil and/or gas and/or associated liquid hydrocarbon rights in the described premises and each and every part thereof and their agents, lessees, licensees, successors, and assigns, including any operator or unit operator, and for the benefit of other lands within any unit area within which the described premises, or any portion thereof may be included, and each and every part thereof.

Section 9. This agreement shall be in full force and effect from and after execution and delivery and shall continue in full force and effect for a period of one (1) year and so long thereafter as the oil and gas rights in the described premises are committed to an oil and gas lease or license or to a unitization agreement, or so long as a well capable of producing oil or gas or associated liquid hydrocarbons is located upon the described premises, or drilling or reworking operations are being conducted thereon, and, upon termination of such lease, license, or unitization agreement, or upon abandonment of such well, or upon cessation of such drilling or reworking operations, whichever last occurs, this agreement shall terminate; provided, however, that such termination shall neither affect nor terminate the rights, expressed or implied, in the deed or deeds referred to in the Recitals hereof.

Section 10. Subject to the provisions of Sections 7 and 9 hereof, this agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

~~Section 11. _____, wife of the above-named Land Owner, does hereby join with her husband in the execution of the foregoing agreement, hereby releasing and waiving all right of homestead and dower in and to the lands above described.~~

IN WITNESS WHEREOF, the parties hereto have executed this

document as of the day and year first above written.

CHAMPLIN PETROLEUM COMPANY

By DO Churchill
Vice President

Secretary

BYRON J. BENTON & SONS SALES COMPANY,
a corporation - Land Owner

By Ralph M. Benton
President

Secretary

President

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CORPORATE ACKNOWLEDGMENT

State of Utah ss
County of San Juan

On this 24 day of Sept, 1974; before me, a Notary Public in and for said County, in the State aforesaid, personally appeared Paul M. Newton, to me personally known, and to me personally known to be the _____ President of _____
HYRUM J. NEXTON & SONS SHEEP COMPANY and to be the same person whose name is subscribed to the foregoing instrument, and who, being by me duly sworn, did say that he is the _____ President of said Company; that the seal affixed to said instrument is the corporate seal of said Corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors; and the said Paul M. Newton acknowledged said instrument to be his free and voluntary act and deed, and the free and voluntary act and deed of said Corporation, by it voluntarily executed, for the uses specified therein.

IN WITNESS WHEREOF, I have herunto set my hand and official seal the day and year above written.

My Commission Expires Feb 2, 1974

[Signature]
Notary Public

Residing at San Juan Co. Utah

(SEAL)

Entry No. 115487 Book H 37
 RECORDED 3-20-72 1:10 PM 285-9
 REQUEST Bass Enterprises, Inc.
 FEE 24.50
 INDEX 3
 ABSTRACT

DEED

This deed dated February 1, 1972, at Salt Lake City, Utah.

I. Parties and Interests Conveyed.

NEWTON SHEEP COMPANY,
 A Limited Partnership
 3744 South 6400 West
 Salt Lake City, Utah 84120,

herein called the Grantor, in consideration of the sum of Ten and More Dollars, in hand paid, and other consideration, does hereby grant, bargain, sell, convey, transfer, assign and deliver unto:

BASS ENTERPRISES PRODUCTION CO.
 1211 Fort Worth National Bank Building
 Fort Worth, Texas,

herein called the Grantee, the interests described in subparagraph A. of this paragraph I, in subparagraph B. of this paragraph I, and in subparagraph C. of this paragraph I.

A. Fee Lands.

1. An undivided 1/2 interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described lands situated in Summit County, State of Utah, to-wit:

SEE EXHIBIT "A" ATTACHED, SIGNED FOR IDENTIFICATION AND INCORPORATED
 HEREIN BY REFERENCE

together with the right of ingress and egress at all times for the purpose of operating and developing said lands for oil, gas and other minerals, and marketing the same therefrom with the right to remove from said lands all of Grantee's property and improvements, including the release and waiver of the right of homestead.

This conveyance is made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed; it being understood and agreed that said Grantee shall have, receive and enjoy the herein granted undivided interest in and to all bonuses, rents, royalties and other benefits which may accrue under the terms of said lease insofar as it covers the above described land from and after the date hereof, precisely as if the Grantee herein had been at the date of the making of said lease the owner of a similar undivided interest in and to the lands described and Grantee one of the lessors therein.

2. Subject to the specific terms of paragraph II hereof, and except for the lands described in subparagraph B. (Exhibit "B" attached), it is the specific intent of the Grantor herein to convey a 1/2 mineral interest in all lands owned by the Grantor in the following townships located in Summit County, Utah:

Township 1 North, Range 7 East
 Township 2 North, Range 7 East
 Township 3 North, Range 7 East
 Township 1 North, Range 6 East
 Township 2 North, Range 6 East

It is specifically understood that no interest of any type in the lands described in subparagraph B. hereof is conveyed under the terms of this subparagraph A.

B. Union Pacific Railroad Company Lands.

One-half of the royalty (of any type) from production of minerals that the Grantor actually receives, or is entitled to receive until February 1, 2072, from the following described land:

SEE EXHIBIT "B" ATTACHED, SIGNED FOR IDENTIFICATION AND INCORPORATED HEREIN BY REFERENCE.

In addition to the specific warranties of paragraph IV hereof, the Grantor, as a real covenant, specifically covenants that the interest conveyed in this subparagraph B. constitutes a mutual covenant running with the land described on Exhibit "B", and all successive future owners of the interest conveyed under the provisions of this subparagraph B., shall have the right to invoke and enforce its provisions as the original signers thereto.

C. Preferential Right of Purchase.

After the date of this deed, in the event that the Grantor receives and intends to accept a bona fide offer for the purchase of any interest in either the minerals or the right to receive royalty (of any type) owned or acquired by the Grantor, in the following townships located in Summit County, Utah,

Township 1 North, Range 7 East
Township 2 North, Range 7 East
Township 3 North, Range 7 East
Township 1 North, Range 6 East
Township 2 North, Range 6 East,

or any part thereof or interest therein, from a person, firm or corporation, ready, able and willing to purchase any interest in either the minerals or the right to receive royalty (of any type) owned or acquired by the Grantor, part thereof or interest therein, the Grantor immediately shall give written notice thereof to the Grantee, including in said notice the name and address of such offeror, the price offered and all other pertinent terms and conditions of the offer. The Grantee, for a period of 15 days after the receipt of said notice, shall have the prior and preferred right and option to purchase from the Grantor, any interest in either the minerals or the right to receive royalty (of any type) owned or acquired by the Grantor, or the part thereof or interest therein, covered by said offer at the price and according to the terms and conditions specified in said offer; provided, that, if the Grantee fails to exercise its said right and option by giving written notice of its acceptance within 15 days after receipt of the above mentioned notice, the Grantor shall accept said offer and complete said sale in accordance with said offer within 60 days after the expiration of said period of 15 days; and provided, further, that if the Grantor fails to accept said offer or to complete said sale within said period of 60 days, the preferred right and option of the Grantee under this paragraph shall be considered as revived, and the Grantor shall not complete said sale to said prospective purchaser unless and until said offer again has been presented to the Grantee, as hereinabove provided, and the Grantee again has failed to elect to purchase on the terms and conditions of said offer. All offers at any time made to the Grantor, its successors, heirs and assigns, for the purchase of any interest in the minerals or the right to receive royalty (of any type) owned or acquired by the Grantor, or any part thereof or interest therein, shall be subject to all the terms and conditions of this paragraph until January 1, 2012, at which time the obligations of this paragraph shall cease.

II. Reservation of Coal.

There is specifically excepted and reserved from this grant, all of the interest Grantor owns in the coal (and the right to receive royalty of any type from coal production), on any lands described on Exhibits "A" and "B" attached hereto. The Grantor further excepts and reserves the right to explore for or mine coal, and to grant to parties other than the Grantee, leases covering coal.

III. General.

A. Grantor releases the right of homestead.

B. There is consideration for this deed.

C. Grantor agrees to execute such further assurances as may be requisite for the full and complete enjoyment of the rights herein granted, and likewise agrees that Grantee herein shall have the right at any time to redeem for said Grantor by payment, any mortgage, taxes or other liens on the above described land, upon default in payment by Grantor, and be subrogated to the rights of the holder thereof.

IV. Warranty.

To have and to hold the above described property with all and singular the rights, privileges and appurtenances thereunto or in anywise belonging to the said Grantee herein, its heirs, successors, personal representatives, administrators, executors and assigns forever, and Grantor does hereby warrant said title to Grantee, its heirs, executors, administrators, personal representatives, successors and assigns forever, and does hereby agree to defend all and singular the said property unto the said Grantee herein, its heirs, successors, executors, personal representatives and assigns against every person whosoever claiming or to claim the same or any part thereof.

V. Notices.

Notices required under the terms of this deed, shall be given to the parties at the addresses shown in paragraph I hereof.

DATED February 1, 1972.

NEWTON SHEEP COMPANY
A Limited Partnership

BY: Ralph M. Newton
General Partner

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On February 1, 1972, personally appeared before me, Ralph M. Newton General Partner for Newton Sheep Company, a limited partnership, that signed the above instrument, who duly acknowledged to me that he executed the same.

Ralph M. Newton
Notary Public
My Commission Expires February 19, 1974
Place of Residence
Salt Lake City, Utah

THE TERMS AND CONDITIONS OF THIS DEED ARE AGREED TO AND ACCEPTED BY:

BASS ENTERPRISES PRODUCTION CO.

BY: Geo. Sampson
President

WITNESSES:
Walter W. Wright
Secretary

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Township 1 North, Range 7 East, SLM

Section 4: ~~SW1/4; SE1/4; NE1/4; SE1/4~~

Section 6: Lots 1, 2, 3, 4

Township 2 North, Range 7 East, SLM

Section 4: Lot 1; ~~SW1/4; SE1/4; NE1/4; SE1/4~~; EXCEPT 13.4 acres described as beginning at a point South 1,634.16 feet and East 1,505.11 feet from NW corner of said Section 4, thence South $34^{\circ}17'$ East 221.2 feet; thence North $88^{\circ}07'$ East 276.6 feet; thence North $10^{\circ}28'$ West 742.5 feet; thence North $79^{\circ}28'$ West 291.38 feet; thence North $74^{\circ}48'$ West 471.79 feet; thence South $35^{\circ}22'$ West 311.75 feet; thence on a $7^{\circ}30'$ curve to the right through an arc of 606.7 feet to beginning.

Section 6: Lots 3, 4, 5, 6, 7; ~~SE1/4; E1/4; SE1/4~~

Section 8: All

Section 16: All

Section 18: Lots 1, 2, 3, 4; ~~E1/4; E1/4~~

Section 20: All

Section 22: Lots 1, 2, 3, 4; ~~SW1/4; SW1/4~~

Section 28: All

Section 30: Lots 1, 2, 3, 4; ~~E1/4; E1/4~~

Section 32: All

Section 34: All

Township 3 North, Range 7 East, SLM

Section 30: ~~E1/4; SE1/4~~

Section 32: ~~SW1/4; SE1/4~~; ALSO, beginning at the NE corner of ~~SE1/4; SE1/4~~, thence West 160 rods; thence South 160 rods; thence North 45° East 226 rods to place of beginning.

Section 34: ~~SW1/4; SE1/4; NE1/4; SE1/4; SW1/4; NE1/4~~

Township 1 North, Range 6 East, SLM

Section 2: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12; ~~SW1/4~~

Township 2 North, Range 6 East, SLM

Section 12: All

Section 24: ~~E1/4; NW1/4; NE1/4; SW1/4~~ AND ALSO a tract containing 37.67 acres described as beginning at the SW corner of said Section 24, thence North $89^{\circ}26'$ West 0.52 chains; thence North $18^{\circ}13'$ West 1.60 chains; thence North $50^{\circ}56'$ West 12 chains; thence North $2^{\circ}30'$ West 2.40 chains; thence North $26^{\circ}27'$ West 4.70 chains; thence North $23^{\circ}10'$ West 3 chains; thence North $22^{\circ}56'$ West 4.50 chains; thence North $19^{\circ}38'$ West 3.10 chains; thence North $30^{\circ}32'$ West 3.60 chains; thence North $24^{\circ}23'$ West 11.30 chains; thence North $0^{\circ}50'$ West 1.40 chains; thence North $43^{\circ}43'$ West 1.30 chains; thence North $39^{\circ}42'$ West 1 chain; thence North $34^{\circ}03'$ West 0.70 chains; thence North $56^{\circ}20'$ West 0.30 chains; thence North $32^{\circ}31'$ West 5.30 chains; thence North $38^{\circ}02'$ West 1.90 chains; thence North $3^{\circ}03'$ West 8.50 chains to NE corner of ~~SW1/4; SE1/4~~; thence East 20 chains; thence South 60 chains to point of beginning.

Section 36: Beginning at the NE corner of said Section 36, thence South along the Section line 80 chains to SE corner of said Section 36; thence West along the Section line to the SW corner of said Section 36; thence North along the Section line 20 chains; thence North $77^{\circ}33'$ East 33.40 chains; thence North $28^{\circ}32'$ East 10 chains; thence North $1^{\circ}03'$ West 40 chains to the Section line; thence East along the Section line 25.33 chains to beginning.

Summit County, Utah

Containing 9316.04 Acres,
More or Less.

L-4636

NEWTON SHEEP COMPANY
A Limited Partnership

BY: Ralph M. Newton
General Partner

Township 2 North, Range 7 East, SLM

Section 7: Lots 1, 2, 3, 4; E₁SW₄; E₁
 Section 9: All
 Section 15: All
 Section 17: All
 Section 19: Lots 1, 2, 3, 4; E₁SW₄; E₁
 Section 21: Lots 1, 2, 3, 4, 5; SE₁NE₁; NW₁; E₁SW₁; SE₁
 Section 27: All
 Section 29: Lots 1, 2, 3, 4, 5; SE₁NE₁; E₁; E₁SW₁; SE₁
 Section 31: Lots 1, 2, 3, 4, 5, 6, 7; SE₁NE₁; SE₁NW₁; E₁SW₁; SE₁
 Section 33: All

Township 3 North, Range 7 East, SLM

Section 19: Beginning at the SW corner of Section 19, thence North along section line 2,640 feet; East 4639.7 feet; South 12°35' West 300 feet; South 40°53' West 393.76 feet South 49°28' West 333.73 feet; South 37°50' West 288 feet South 3°48' East 154.4 feet; South 13°25' West 317.0 feet; South 41°33' West 316.0 feet; South 57°39' West 196.6 feet; South 25°59' West 265.3 feet; South 24°05' West 192.2 feet; South 26°04' West 261.7 feet; South 0°06' East 153.28 feet to South line of Section 19; thence West 3,114.46 feet to beginning.
 Section 29: SW₁
 Section 31: E₁ of Section 31, less 45.91 acres in 2 exceptions.
 Section 33: All

Township 1 North, Range 6 East, SLM

Section 1: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14; W₁SE₁; SW₁

Township 2 North, Range 6 East, SLM

Section 1: Lots 1, 2, 3, 4; SE₁NW₁; SW₁
 Section 13: Beginning 12.45 chains South 89°39' East of SW corner of Section 13, thence North 17°42' West 40.01 chains. North 40 chains; South 89°31' East 79.5 chains; South 80 chains; North 89°39' West 66.75 chains to beginning.
 Section 25: 132.83 acres in NE₁ of Section 25, 142.1 acres in E₁ of Section 25

Summit County, Utah

Containing 10,003.70 Acres, More or Less.

NEWTON SHEEP COMPANY
 A Limited Partnership

BY: Ralph M Newton
 General Partner

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